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No. 88-5909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOCK MCKOY, JR.,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of North Carolina

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

I. Did the trial judge's capital sentencing instructions, which explicitly informed the jurors that they could not consider mitigating evidence unless it was unanimously found to support a mitigating circumstance, violate this Court's holding in *Mills* v. *Maryland*, 486 U.S. ___ (1988)?

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OPINION BELOW

The opinion of the North Carolina Supreme Court is officially reported at 323 N.C. 1, 372 S.E.2d 12 (1988), and appears in the Joint Appendix (hereinafter cited as "J.A.") at 27-112.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982). The judgment of the Supreme Court of North Carolina affirming Petitioner's conviction and sentence was entered on September 27, 1988. A petition for writ of certiorari was docketed in this Court on November 17, 1988, and was granted on February 21, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment, Constitution Of The United States.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, Constitution Of The United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statutes § 15A-2000 (1983)

North Carolina General Statutes § 15A-2000, Capital Punishment, is set forth in the Appendix to this Brief at App. 1-App. 4.

STATEMENT OF THE CASE

A. The Challenged Instructions

The sentencing jury at Dock McKoy's capital trial received oral and written instructions before retiring to decide McKoy's punishment. Both sets of instructions informed the jury how it was to proceed in its deliberations. An "Issues and Recommendations as to Punishment Form" (hereinafter "verdict form") was provided to the jury in writing.[1] Consistent with the trial judge's oral instructions,[2] the verdict form directed the jury to answer four questions. It explained to the jury how to go about answering those questions and how the jury must use the answers to determine life or death.(J.A. 5-6)

In Issue One, the jury was instructed to determine whether any aggravating circumstances were present. In order to find the existence of an aggravating circumstance the jurors were told that they must unanimously agree that the State had proved the existence of the circumstance beyond a reasonable doubt. (J.A. 8, 23) The court submitted the following two aggravating factors, which were provided by statute:

1. That Dock McKoy had been previously convicted of a felony involving the use of violence to the person.[3]

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[1] A copy of the verdict form is in the Joint Appendix. (J.A. 23-26)

[2] The trial court's oral instructions to the jury are included in the Joint Appendix. (J.A. 4-22)

[3] N.C. Gen. Stat. § 15A-2000(e)(3) (1983). (App. 4a).

2. That the murder was committed against a deputy sheriff while engaged in the performance of his official duties.[4]

(J.A. 6-8, 23-24) The jury found both of these aggravating circumstances. Consequently, the jury marked "yes" in answer to the first question on the verdict form, and, as it was instructed to do, moved on to answer the second question. (J.A. 24)

In Issue Two the jury was instructed to find whether any mitigating circumstances existed. The jury was specifically instructed, both in writing on the verdict form and orally, that it must answer "no" to any mitigating circumstances upon which the jurors were unable to reach unanimous agreement. (J.A. 8-13, 24-25) The verdict form gave the jury the following instructions as to the second issue:

ISSUE TWO:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER:____

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. *WRITE "NO," IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE.*

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[4] N.C. Gen. Stat. § 15A-2000(e)(8) (1983). (App. 5a).

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE "YES," IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE "NO", IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE "NO," IN THE SPACE AFTER ISSUE TWO.

(J.A. 24) (emphasis added).

The court submitted to the jury three statutory and five non-statutory mitigating circumstances. (J.A. 9-13, 25) The jury unanimously found the statutory mitigating circumstance that "the capacity of Dock McCoy [sic] to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired,"[5] and the non-statutory mitigating circumstance that "Dock McKoy has borderline intellectual functioning with a [sic] I.Q. test score of 74." (J.A. 25) The jury failed to find unanimously the statutory mitigating circumstances that:

1. The murder was committed while Dock McKoy was under the influence of mental or emotional disturbance;[6] and,

2. The age of Dock McKoy at the time of this murder [i.e., 65] is a mitigating circumstance.[7]

(J.A. 25) The jury also failed to find unanimously the following non-statutory mitigating circumstances:

3. That for several decades Dock McKoy has exhibited signs of mental or emotional defect that went untreated.

[5] N.C. Gen. Stat. § 15A-2000(f)(6) (1983). (App. 6a).

[6] N.C. Gen. Stat. § 15A-2000(f)(2) (1983). (App. 5a).

[7] N.C. Gen. Stat. § 15A-2000(f)(7) (1983). (App. 6a).

4. That Dock McKoy's mental and emotional disturbance is aggravated by his poor physical health.

5. Dock McKoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

6. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.[8]

(J.A. 25) Because the jury found at least one mitigating circumstance, it was directed to continue to Issue Three. (J.A. 13, 25)

In Issue Three the jury was asked to decide whether the mitigating circumstances that it had *unanimously found* in Issue Two outweighed the aggravating circumstances unanimously found in Issue One. (J.A. 13-14, 26) As to this issue, the verdict form, which was identical to the trial court's oral instructions (J.A. 13), read:

ISSUE THREE:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances *found by you* is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

(J.A. 26) (emphasis added). The jury answered the third issue "yes."

Pursuant to its instructions the jury then proceeded to the fourth and final issue. (J.A. 14, 26) In Issue Four the jury was asked:

ISSUE FOUR:

[8] This "catch-all" circumstance, which is provided by statute, N.C. Gen. Stat. § 15A-2000(f)(9) (1983), (App. 6a), is listed here with the "nonstatutory" circumstances because it authorizes the jury to consider mitigation that is not expressly provided in the statutory list.

> Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances *found by you?*

(J.A. 26) (emphasis added). In Issue Four, as in Issue Three, the jury was instructed that it could only consider the mitigating circumstances that the jury had unanimously "found." The jury answered this fourth issue "yes."

Finally, the jury was instructed that if it answered Issue Four "yes," it was required to sentence the defendant to death. (J.A. 15, 26) The jury, accordingly, sentenced McKoy to death.

B. Trial Testimony

On the afternoon of December 22, 1984, Dock McKoy, a sixty-five year old laborer, shot and killed Deputy Sheriff Kress Horne. Because the issue presented is the application of *Mills* v. *Maryland*, 486 U.S. ___ (1988), to this particular case, it is necessary to state the facts of record in some detail. Petitioner does this with attention to the testimony that reasonable jurors might have found sufficient to establish mitigating circumstances by a preponderance of the evidence if the jurors had been free to consider all of the mitigating evidence without the restrictions of a unanimity requirement.

1. The State's Guilt Phase Evidence

During the guilt phase of McKoy's trial, witnesses for the State described the events of December 22, 1984 as follows: Around two in the afternoon, McKoy was seen firing a shotgun into the air from the porch of his home

located in a rural area near Wadesboro, North Carolina. Concerned for the safety of children in the neighborhood, a neighbor cautioned McKoy against firing his gun in the air. McKoy responded that everybody else was shooting and that it was Christmas. (Tpp. 448-49)[9] There was no evidence, however, that anyone else had been firing a weapon. In response to a call from the neighbor, a sheriff's deputy came and talked to McKoy through the screen door of McKoy's house. That officer testified that McKoy had acted confused and was highly intoxicated. (Tpp. 506-08) The officer told McKoy that he was too drunk to be firing his gun and that he should wait until he sobered up and then he could go fire it in the surrounding woods. (Tpp. 490)

Between four and five p.m., McKoy fell down in front of his outhouse. His pants were down around his ankles and he appeared unable to get them back up. He was talking to himself, muttering both, "Oh, Lord, help me, help me" and "Don't bother me, don't bother me." (Tpp. 467-68) McKoy could not get back to his feet until a neighbor arrived to assist him. (Tpp. 467-71) Approximately fifteen or twenty minutes later, McKoy locked himself out of his house and hailed Mark Cox, a teenager who lived nearby, for help. When Cox left, McKoy called out for him to come back, asserting that Cox had taken money belonging to him. Cox testified that McKoy subsequently fired two or three shots from his gun in Mr. Cox's direction. (Tpp. 523-30) Cox's sister testified that she was struck by a pellet which "stung her leg," although it did not break the skin. (Tpp. 537-39) The authorities were again summoned.

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[9] References to "Tp" designate the transcript of the trial.

This time Lieutenant Robert Usery and Deputy Kress Horne responded to the call. After speaking with McKoy's neighbors to find out what had happened, the officers called out to McKoy and asked him to come out of his house so the officers could talk with him. (Tp. 572) According to Lieutenant Usery, McKoy first responded that he would kill them if they did not leave and then he stated that he would come out if they left. *Id.* The officers spoke further with McKoy's neighbors and advised them that they would have to obtain a warrant if they wanted to take action against McKoy. (Tp. 573) The officers then once more called for McKoy to come out of the house. McKoy again responded that he would come out if the officers left. They told him they could not do that. (Tp. 574)

After the arrival of additional law enforcement officers, Lieutenant Usery went to the rear of the house to see if he could enter through the back door. Meanwhile, Deputy Horne stood behind the patrol car with his pistol drawn and braced across the roof of the vehicle, while he continued to talk to McKoy. (Tpp. 576-77) Seconds later, McKoy pushed open his screen door and fired a single shot from within the house. Bird shot from that blast struck Deputy Horne in the face. Dr. John Butts, who performed the autopsy, testified that Deputy Horne was killed by two pellets which passed through his right eye and into the brain. (Tpp. 650-51)

After Deputy Horne was shot, the other officers surrounded the house. Usery warned McKoy that if he did not come out of the house the officers would use tear gas. When he received no response from McKoy, Usery fired tear gas through a window. When they heard two shots go off inside, the officers began shooting into the house. (Tpp. 580-81) Shortly afterwards, McKoy came out of the front door carrying the shotgun, unbreeched, in one

hand. (Tpp. 493-97) He was wounded and acted confused. An officer took hold of him and pulled him to the ground. (Tpp. 498-507) McKoy was taken by ambulance to Anson County Hospital in Wadesboro.

Investigators found two expended shells inside the house near the front door and two more in the interior area. (Tp. 656) They also found three half gallon bottles of whisky in the living room as well as a glass containing whisky. The kitchen contained a large number of beer cans and three empty liquor bottles. There was a trail of blood from the kitchen to the front door. (Tp. 657) A partially empty box of shotgun shells was found in the bedroom. Ballistics evidence established that the expended shells had been fired from McKoy's gun and had contained No. 6 bird shot. (Tp. 694)

The State also introduced testimony recounting statements made by McKoy during a custodial interrogation conducted a few hours after the killing. (Tp. 802) During that questioning McKoy gave a rambling account of what he thought happened that day. He stated that a young boy had come to his house and asked for twenty-five cents. McKoy told the boy that he did not have the money and chased him out of the house. The boy returned with two companions and threatened McKoy with harm if he tried to stop them from getting his money. (Tp. 814) The boys ransacked his house and one of them hit him in the back of the head and knocked him down. McKoy chased them from the house and attempted to "pepper them a little bit" with his shotgun. Prior to that time he had been at a neighbor's and consumed a quarter of a pint of whisky and a few swallows of beer. (Tp. 815) He left around 12:30 p.m. and went home to take a nap. After chasing off the boys, McKoy went back to sleep. He was awakened about 2:30 p.m. when police entered his house. (Tp. 816) He told the

police that they should have knocked and that they should be out chasing the boys. The officers left, but returned about fifteen minutes later and wanted to arrest him. They pointed guns at him, but he told them he wasn't going anywhere.

McKoy also said that a white officer had drawn a weapon outside the house and was pointing it at him. When asked why he had shot that officer, McKoy said, "[b]ecause he pressured me, he pressured me the wrong way." (Tp. 818) When asked if he was fearing for his life at that time, McKoy responded that he was fearing for his life right then. He was then asked if he had to do the same thing again, would he do it. His answer was: "I'll fight until I die." (Tpp. 818-19) Asked if he would do it the same way, he answered: "Yes, but I'd probably do it quicker." Asked if he knew he had shot a police officer, McKoy responded, "[s]o what a police officer shot a man around here not long ago." When the question was reiterated, McKoy said, "[s]o what a police officer ain't no more than anybody else." (Tp. 819) McKoy went on to say that the officer was sighting down on him from behind the car and he just sort of raised his shotgun in one hand and fired. *Id.*

2. The Petitioner's Guilt Phase Evidence

Dr. Merceda Perry, an emergency room physician at Anson County Hospital in Wadesboro, testified that he had begun treating McKoy for two serious gunshot wounds at approximately 6:30 p.m. Dr. Perry described those wounds as a puncture wound to the buttocks and laceration through the forehead down to the skull, the latter causing McKoy to be temporarily blind. (Tpp. 843-45) While wounds of the type McKoy had sustained are normally very painful, McKoy did not indicate that he was suffering the normal degree of pain. The doctor attributed those circumstances to the degree of McKoy's

alcohol intoxication. (Tp. 851) McKoy's blood alcohol level was measured as being equivalent to a .264 reading on the breathalyzer scale—a reading consistent, in Dr. Perry's opinion, with McKoy's observed behavior. (Tp. 855)

Dr. Robert Rollins, Clinical Director of the State's forensic psychiatry unit, had examined McKoy prior to trial. (Tpp. 858, 866) He testified that McKoy was suffering from five separate conditions. First, Dr. Rollins testified that McKoy had a personality disorder "characterized by denial, paranoid thinking, concrete thinking, impaired abstract thinking, impaired judgment, impaired insight, impaired perception, overreacting to things, poor interpersonal skills, defensiveness, ineffectiveness in functioning and antisocial behavior." (Tp. 870) Second, Dr. Rollins diagnosed McKoy as suffering from borderline intellectual functioning based on intelligence testing that revealed an IQ of 74. *Id.* The third diagnosis was "episodic alcohol abuse." *Id.* Fourth, Dr. Rollins diagnosed McKoy as suffering from "alcohol intoxication, recovered." *Id.* The fifth diagnosis was that McKoy suffered from "organic delusional syndrome manifested by false beliefs." *Id.* Dr. Rollins specifically considered whether McKoy might have been faking or malingering and concluded that he was not. (Tp. 885)

Mr. McKoy's principal guilt phase defense was that he was legally insane at the time of the offense. Dr. Rollins stated his opinion that "as a result of mental disorder McCoy (sic) was neither able to appreciate the quality of his actions or distinguish between right and wrong" at the time of the offense.[10] (Tp. 889) He further testified that as

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[10] Under North Carolina law the test of insanity as a defense to a criminal charge is the capacity of the defendant to distinguish between right and wrong at the time of and in respect to the matter under investigation. *State* v. *Mize*, 315 N.C. 285, 289, 337 S.E.2d 562, 565 (1985).

a result of McKoy's mental disorder, McKoy was unable to form the specific intent to kill Deputy Horne or to premeditate and deliberate. (Tpp. 889-90) In addition to his opinion that McKoy's mental illness rendered him legally insane and unable to premeditate and deliberate, Dr. Rollins also noted that, in his opinion, McKoy perceived his actions of December 22, 1984, including shooting his gun in the direction of Mark Cox, to be self-defense. (Tp. 895) Dr. Rollins was also of the opinion that McKoy's mental illnesses were long-standing and were exacerbated by his intoxicated condition on December 22, 1984. (Tpp. 884-85)

Mr. McKoy took the stand on his own behalf and gave a bizarre account of the events surrounding the death of Deputy Horne. (Tp. 911) McKoy testified that on the evening of December 21, 1983, he had looked out the door after returning from squirrel hunting and saw the sheriff outside shooting in his front door. He identified the sheriff, as "Sheriff Allen, High Sheriff of Anderson County." The sheriff was alone. The sheriff fired at McKoy's house "a good many times." (Tp. 915) McKoy testified that he walked out to him and asked him what he was doing. The sheriff said he wanted Paul McKoy out there so they could arrest him for "shooting behind children." (Tp. 916) The sheriff also stated that Paul McKoy had "shot my Sheriff in the face and he's in that house and I want him out." *Id.* Sheriff Allen then started shooting at the house again. McKoy told him to quit shooting and stated: "If I had children in there . . . you'd done be killed them." *Id.*

Sheriff Allen read McKoy a warrant for Paul McKoy for shooting at children and then told him that his "party sheriff had been shot and was in the hospital." *Id.* They talked about McKoy's shotgun and Sheriff Allen told him to get it. At that point, the sheriff again started shooting

at the house. McKoy begged him to stop. (Tp. 917) Sheriff Allen then started shooting all around McKoy's feet. McKoy went back into his house, after which the shooting stopped for a while. The sheriff then started yelling that he was tired of waiting on Paul and started shooting again. McKoy went back out and Sheriff Allen made him show his hunting license and told him it was expired. The sheriff started shouting for Paul again and shooting at the house. (Tp. 918) McKoy argued with him about shooting up his house. In response, Sheriff Allen turned his gun on McKoy and started shooting at him again. McKoy ran back into his house. The sheriff renewed his hollering for Paul to come out and McKoy continued to tell the sheriff to quit shooting into his house. *Id.*

Later, various people forced their way into McKoy's house and McKoy was hit on the head. (Tp. 920) When he regained consciousness, people were injecting him with something. *Id.* When he got up another bullet was fired into his bedroom. (Tpp. 921-23) McKoy could remember nothing else of that night. He awoke on Saturday morning and a big fat woman was in his house. (Tp. 924) McKoy later went out to his outhouse and when he returned Sheriff Allen had come back. When McKoy tried to pick the lock on the door to his house, the sheriff began shooting. Sheriff Allen was hollering, "Come out, Paul." McKoy told the sheriff that Paul did not live there, but the sheriff told McKoy that he had seen Paul go in the house earlier that morning. (Tp. 925) Sheriff Allen made McKoy go get his shotgun from the house, like he had the evening before. When the sheriff kept on shooting, McKoy took the shotgun back to the house.

A young boy was in his house when he went in. When McKoy asked what he was doing there, the boy said that if he lay on top of McKoy, Allen would stop shooting. *Id.*

McKoy demanded to know whether the boy was a homosexual. He ordered the boy to leave. *Id.* A variety of people McKoy knew, came to, and subsequently left, the house. (Tpp. 926-27) Some men came to the house and had McKoy turn on his T.V. After the T.V. was turned on, "they went try—like they were dancing and found out that —that the T.V. camera was set up in the house. You could see us, what we were doing in the house on my T.V." (Tp. 927) After that, at least forty or fifty "transporters" gathered in front of the house. (Tp. 928) Eventually, two men came in the house and started appraising the furnishings. (Tp. 929) When McKoy tried to argue with them they pushed him down and handcuffed him. He left the house with them, but outside, Sheriff Allen demanded to know whether McKoy owed rent and a lengthy discussion ensued on that subject.(Tpp. 930-32)

After the others left and after additional shooting by the sheriff, McKoy decided to make himself something to eat, not having eaten anything so far that day. (Tp. 933) As he reached the kitchen and opened a can of sardines, he heard a noise and found that tear gas had been fired into the house. *Id.* Sheriff Allen shouted, "You better come out of there or you'll die in there." *Id.* When McKoy started out the door, Sheriff Allen ordered him to bring his shotgun with him. McKoy returned to the kitchen to get the gun, but before he could walk out the sheriff ordered him to turn and face the wall. When he did so, he was shot in the right hip. (Tp. 934) McKoy spun around and was then shot in the head. *Id.* Two officers jumped out from somewhere and handcuffed him, telling him he would be alright if he did not fight. They put him in a car and took him to the parking lot at the jail. *Id.* He was transferred to another car and taken straight to Raleigh. McKoy testified that he had never been in the hospital in

Wadesboro. (Tp. 934) He denied having drunk any substantial amount of alcohol during the time in which the events testified to occurred. (Tp. 935) He did not remember having his shotgun during that period of time. (Tp. 936) The jury found McKoy guilty of first degree murder. (Tp. 1078)

3. The Penalty Phase Evidence

At the penalty phase of McKoy's trial, the State presented evidence that McKoy had pleaded guilty to second degree murder in 1952. (Tp. 1107)

The defense called Dr. Patricio Lara, a forensic psychiatrist employed by the State at Dorothea Dix Hospital in Raleigh. (Tp. 1110) Dr. Lara diagnosed McKoy as having an adjustment disorder with mixed disturbance of emotions and conduct as well as an underlying personality disorder with mixed paranoid and narcissistic features. (Tpp. 1112-13) Dr. Lara was satisfied that McKoy was suffering from significant psychological disorders that had existed for a number of years and that the effect of those disorders would be exacerbated in situations of stress or when McKoy was also impaired by alcohol. (Tp. 1115)

Dr. Rollins was recalled to the stand and testified that in his expert opinion McKoy was under the influence of a mental or emotional disturbance at the time he shot Deputy Kress Horne. (Tp. 1133)

After instructions from the court, which prohibited the jury from considering any mitigating circumstance which was not unanimously found by a preponderance of the evidence, the jury returned a death verdict.

C. Procedural History

On appeal to the Supreme Court of North Carolina, McKoy challenged, *inter alia*, the judge's instructions

requiring jury unanimity on the existence of a mitigating circumstance before that circumstance can be considered in the penalty decision.[11] *State* v. *McKoy*, 323 N.C. 1, 30, 372 S.E.2d 12, 27 (1988) (J.A. 27, 57). Shortly after this case was briefed and argued in the Supreme Court of North Carolina, this Court decided the case of *Mills* v. *Maryland*, 486 U.S. ___ (1988). Thereafter, the Supreme Court of North Carolina ordered supplemental briefing and additional argument on the question of whether *Mills* might have some impact on this case.

In its opinion, a majority of the Supreme Court of North Carolina identified two differences between the capital sentencing procedures in North Carolina and Maryland. First, the court noted that in *Mills* the jury was instructed to return a death verdict if it found that the aggravating circumstances were not outweighed by the mitigating circumstances; while in North Carolina the jury must also determine that the aggravating circumstances found are sufficiently substantial, when considered in light of the mitigating circumstances found, to call for the death penalty. *State* v. *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33 (J.A. 69). Second, the court held that mitigating evidence is deemed "legally irrelevant" in North Carolina if the mitigating circumstances relating to that evidence are not unanimously found by the jury. *State* v. *McKoy*, N.C. at 40-41, 372 S.E.2d at 33-34 (J.A. 69-70). The court also cited the post-*Mills* denials of certiorari in two North Carolina cases[12] where the unanimity issue

[11] McKoy's trial lawyer requested an instruction that would have permitted those jurors who found some factor to be mitigating to consider it in the sentencing decision even if other jurors disagreed. (J.A. 2) The trial judge denied counsel's requested instruction. (J.A. 3)

[12] *Holden* v. *North Carolina*, *cert. denied*, 469 U.S. 1230 (1988); *Gardner* v. *North Carolina*, *cert. denied*, 469 U.S. 1230 (1988).

was raised as "further support[]" for its position regarding the inapplicability of *Mills* to Dock McKoy's case. *State* v. *McKoy*, 323 N.C. at 43, 373 S.E.2d at 35 (J.A. 74). For these reasons, it was "unable to conclude with any degree of certainty that *Mills* rendered our capital sentencing procedure constitutionally infirm." *State* v. *McKoy*, 323 N.C. at 44, 372 S.E.2d at 35 (J.A. 74).

In dissent, the Chief Justice of the state supreme court, joined by Justice Frye, expressed the view that the unanimity requirement imposed on Dock McKoy's jury violated the Eighth and Fourteenth Amendments as construed in *Mills*. They noted that, as in *Mills*, under North Carolina law the unanimity requirement creates an unconstitutional risk that jurors can be prevented from considering mitigating circumstances that they might wish to consider in deciding whether to impose the penalty of death. *State* v. *McKoy*, 323 N.C. at 52, 372 S.E.2d at 44 (J.A. 85) (Exum, C.J., dissenting). Further, according to the dissenters, the majority's argument that mitigating circumstances that were not unanimously found ceased to be legally relevant, "stands *Mills* and the Eighth Amendment jurisprudence upon which it rests on their respective heads." *State* v. *McKoy*, 323 N.C. at 54, 372 S.E.2d at 45 (J.A. 87) (Exum, C.J., dissenting).

After the decision in *McKoy*, this Court vacated and remanded the judgment of the Supreme Court of North Carolina in another capital case in the light of *Mills*. *Lloyd* v. *North Carolina*, ___ U.S. ___, No. 87-6833 (October 3, 1988). Three days later, the Supreme Court of North Carolina reaffirmed its *McKoy* holding. *State* v. *Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988). The state court was aware of this Court's order in *Lloyd* when it decided *Allen*. *State* v. *Allen*, 323 N.C. at 237, 372 S.E.2d at 872 (Exum, C.J., dissenting).

Dock McKoy's petition for the writ of certiorari was docketed in this Court on November 17, 1988. On November 18, 1988, the Supreme Court of North Carolina reconsidered its decision in *Lloyd* in light of *Mills* and again reaffirmed its holding in *McKoy. State* v. *Lloyd*, 323 N.C. 622, 374 S.E.2d 277 (1988). On February 21, 1989, this Court granted the writ.

SUMMARY OF ARGUMENT

The instructions at McKoy's trial expressly prohibited the entire jury from considering any mitigating circumstances not unanimously "found." These instructions violated this Court's holding in *Mills* v. *Maryland*, 486 U.S. ___ (1988), by precluding any juror from giving consideration to mitigating evidence unless all twelve jurors agreed on the existence of a mitigating circumstance relating to that evidence. Thus, a single juror had the power to block the entire jury from considering substantial mitigating evidence that McKoy had proffered as a reason to spare his life.

A majority of the court below relied on two differences between the capital sentencing procedures in North Carolina and Maryland to uphold these instructions. First, the court noted that in Maryland a death sentence is compelled if aggravating circumstances outweigh mitigating circumstances, while in North Carolina a death sentence is not compelled unless the aggravating circumstances are also found to be sufficiently substantial, in light of the mitigating circumstances unanimously found, to call for death. Second, the court decided that in North Carolina unless a mitigating circumstance is found to exist by all twelve jurors the evidence relating to that circumstance is rendered "legally irrelevant" and thus drops from the jury's consideration. These perceived differences do not distinguish the instructions given in this case from those condemned in *Mills*.

Mills is not limited to cases in which death is compelled when aggravation outweighs mitigation. Rather, the constitutional violation condemned in *Mills* is the preclusion of any relevant mitigation in the penalty decision. Moreover, notwithstanding North Carolina's novel interpretation of "legal relevancy," this Court has consistently held that the Eighth Amendment forbids interposing barriers to the sentencer's consideration of aspects of the defendant's character and record and the circumstances of the offense that the defendant offers as a basis for a sentence less than death. As a federal constitutional matter, such barriers are prohibited whether they are interposed by statute, by the sentencing court, by an evidentiary ruling, or by a single juror's vote against finding mitigating circumstances. *Mills* v. *Maryland*, 486 U.S. at ___, slip op. at 7 (citations omitted).

The risk that a single juror could block consideration of mitigation and consequently require the imposition of a death sentence rendered these instructions unconstitutional under *Mills*.

ARGUMENT

A. The Trial Court's Instructions To The Jury, Allowing One Juror To "Blackball" The Entire Jury's Consideration Of Evidence In Mitigation, Plainly Violates The Rule Of *Mills*.

Mills v. *Maryland*, 486 U.S. ___ (1988), squarely controls this case. Indeed, this case presents none of the instructional ambiguity that divided the Court in *Mills*. Ralph Mills's death sentence was rendered unconstitutional by a jury instruction that could reasonably have been construed as requiring the jury to agree unanimously that a mitigating circumstance existed before

mitigating evidence relating to that circumstance could be considered in the sentencing decision. By contrast, the jurors at Dock McKoy's capital sentencing trial were *expressly* forbidden to consider any evidence in mitigation of the penalty of death unless all twelve jurors unanimously "found" the existence of the mitigating circumstance supported by that evidence. Under this instruction each juror was, in effect, given a "blackball" that permitted a single holdout juror to prevent the other eleven jurors from considering mitigating evidence. Thus, the jury was required to return a death sentence even if eleven jurors were firmly convinced that mitigating circumstances existed and rendered a death sentence inappropriate.

The sentencing instructions told Mr. McKoy's jury that it could consider mitigating evidence as bearing upon its penalty decision in two distinct ways. First, the jury might determine that the mitigating circumstances *unanimously found* outweighed the aggravating circumstances unanimously found (Issue Three). Second, the jury could determine that the mitigating circumstances *unanimously found* sufficiently abated the effect of the aggravating circumstances so that the latter would not call for death (Issue Four). Neither the Supreme Court of North Carolina nor the Respondent has ever contested that the instructions forbade the consideration of mitigating evidence *for either purpose* unless the mitigating circumstances supported by that evidence were unanimously found by the jury. Further, neither the Respondent nor the Supreme Court of North Carolina disputes that under this system *a single juror* has the power to preclude the entire jury from considering mitigating circumstances and the evidence relating to those circumstances, notwithstanding that the circumstances

are found to exist, and to call for a life sentence, by the other eleven members of the jury. Also, as in *Mills*, the jury would be required to return a death sentence even if all twelve jurors agreed that mitigating circumstances had been shown by a preponderance of the evidence which called for a life sentence, so long as the jurors could not unanimously agree as to any one particular mitigating circumstance.

Out of the six "unfound" mitigating circumstances in this case, two were statutory mitigating circumstances and four were non-statutory mitigating circumstances. In North Carolina, statutory mitigating circumstances are deemed to have mitigating value as a matter of law. *State* v. *Stokes*, 308 N.C. 634, 653, 304 S.E.2d 184, 196 (1983). The trial judge must submit to the jury any statutory mitigating circumstances where there is "sufficient evidence from which the jury could reasonably infer that these mitigating circumstances existed." *Id.* As to non-statutory mitigating factors, the judge must submit as a mitigating circumstance any fact that is propounded by the defendant, supported by the evidence, and that a juror could reasonably deem to have mitigating value. *State* v. *Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056 (1982). The jury must then decide both whether a non-statutory factor is factually proved and whether it has mitigating value. *See id.*, at 26, 292 S.E.2d at 223, *citing State* v. *Johnson*, 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-17 (1979).

A single juror in this case could have used his blackball to thwart findings in mitigation under Issue Two and thus to preclude any consideration of that mitigation under Issues Three and Four in a variety of ways. Eleven jurors, for example, could have been convinced by a preponderance of the evidence of the existence of the statutory

mitigating circumstance that the murder was committed while Dock McKoy was under the influence of mental or emotional disturbance. These eleven jurors could have believed that this powerful mitigating circumstance, either alone or in combination with the other mitigation, was sufficient reason to spare Dock McKoy's life.[13] Nevertheless, the disagreement of a single juror that this mitigating circumstance was established by a preponderance of the evidence would preclude the other eleven jurors from giving any consideration whatsoever to the evidence supporting the circumstance.

All twelve of the jurors probably agreed that McKoy was sixty-five years old. Eleven of the jurors might have found that this circumstance had mitigating value which, if considered, would make the death sentence inappropriate. Yet the view of a single juror that this uncontested fact was not mitigating could prevent the entire jury from considering McKoy's advanced age in deciding the appropriate sentence.

Likewise, all but one of the jurors could have believed that Dock McKoy's mental and emotional disturbances were aggravated by his poor physical health and that this was a mitigating factor. One holdout juror could prevent

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[13] The present Chief Justice of the North Carolina Supreme Court has noted that of the mitigating circumstances set out by statute in North Carolina this circumstance, along with the mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired," N.C. Gen. Stat. § 15A-2000(f)(6), seem to be the most important. Exum, *The Death Penalty in North Carolina*, 8 Campbell L.Rev. 1, 8 (1985). Chief Justice Exum noted that a death sentence was especially rare in those cases in which both of these factors were found by the jury. *Id.* In this case, the jury found that Dock McKoy's capacity was impaired.

the entire jury from considering this circumstance in mitigation.

Eleven of the twelve jurors could have credited and found mitigating the fact that McKoy had exhibited signs of mental and emotional disease for decades, and that this illness went untreated. But if one juror dissented as to the underlying facts *or* on the factor's mitigating value, that juror could keep the entire jury from considering *both* the facts *and* the circumstance.

Finally, eleven of the jurors could have determined from the evidence that other circumstances existed that were mitigating. For instance, eleven jurors could have agreed with Dr. Rollins's opinion that McKoy believed he was acting in self-defense at the time he shot Deputy Horne. These eleven jurors further could have found that McKoy's belief that he was acting in self-defense was mitigating. As with the circumstances that were specifically enumerated, however, a lone juror could prevent all of the remaining jurors from giving any consideration to this, or any other, circumstance which the other eleven jurors agreed existed and was mitigating.

In *Mills*, the petitioner suggested that under Maryland's capital sentencing scheme, eleven jurors might agree that there were mitigating circumstances, but since one juror disagreed, no mitigation would be found and a death verdict would be returned even though eleven jurors thought the penalty inappropriate. This Court held that "it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated by petitioner . . . ." *Mills*, 486 U.S. at ____, slip op. at 6. On this point the operation of the Maryland and North Carolina sentencing schemes is indistinguishable. Both permit a single juror

to blackball the entire jury's consideration of mitigating evidence, and both could require a jury to return a death verdict even though eleven of the twelve jurors agree in finding the existence of mitigation that makes the death penalty wholly inappropriate. "The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Mills*, 486 U.S. at ____, slip op. at 16. This case must therefore be reversed under *Mills* v. *Maryland*.

B. Substantial Mitigating Evidence Was Precluded From The Jury's Consideration In Determining Whether Dock McKoy Should Live Or Die.

Competent evidence was presented to support each of the six mitigating circumstances submitted to, but not unanimously found by, the jury.

The jury was instructed in the penalty phase that there was no requirement that evidence submitted in the guilt phase be resubmitted in the penalty phase. Rather, the court instructed that "[a]ll of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment." (Tp. 1175) Dr. Robert Rollins, a forensic psychiatrist who is the Clinical Director of the forensic unit at Dorothea Dix state mental hospital (Tpp. 859-860, 865), testified on McKoy's behalf at both the guilt and penalty phases of trial. Dr. Rollins was appointed by the trial court over McKoy's strenuous objection. McKoy sought the appointment of an "independent psychiatrist." (Mp. 21)[14] Instead, the court appointed Dr. Rollins, an employee of the State of North

[14] References to "Mp" designate the transcript of the pre-trial motions hearings.

Carolina. Dr. Rollins has regularly testified for the prosecution as well as for the defense in capital murder cases in North Carolina.[15]

Dr. Rollins testified that he received his medical degree from Duke University, that he is one of only 165 board certified specialists in Forensic Psychiatry in the country, that he is a lecturer in psychiatry at Duke University and a professor of psychiatry at the University of North Carolina Medical School in Chapel Hill. He is a past president of the North Carolina Psychiatric Association and Chairman of the Section on Psychiatry and Neurology of the North Carolina Medical Society. In addition, Dr. Rollins told the jury that in his capacity as Clinical Director of the state's forensic psychiatry unit, he had testified as an expert in the field of forensic psychiatry about two hundred times and that he performs about three or four hundred forensic psychiatric examinations a year. He explained that he had not only testified as an expert witness on behalf of the prosecution in many cases, but that he had previously testified as an expert for the very prosecutor who was trying Dock McKoy. (Tpp. 860-64)

Dr. Rollins informed the jury that Dock McKoy was an extremely disturbed individual with a long history of

[15] *See e.g.*, *State* v. *Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986) (Dr. Rollins testified on behalf of State in guilt phase of capital trial that defendant was able to form specific intent to kill); *State* v. *Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983) (Dr. Rollins testified on behalf of State that capital murder defendant's claimed amnesia could not be confirmed, that he knew the nature and consequences of his acts, and could distinguish between right and wrong); *State* v. *Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975) (Dr. Rollins testified that defendant was without psychosis, was not insane, and was "just mean"); *State* v. *Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985) (Dr. Rollins testified on behalf of State that murder defendant knew that it was wrong to kill victim).

extensive mental illness. He diagnosed McKoy as suffering from severe mental or emotional disorders that included "organic hallucinosis" and paranoia. McKoy's mental and emotional disturbance influenced virtually every aspect of his judgment and ability to reason. Indeed, Dr. Rollins diagnosed McKoy as a man whose mental illness was so severe that it made him unable to distinguish right from wrong or to premeditate and deliberate. McKoy's mental illness, in Dr. Rollins's opinion, caused McKoy honestly to believe that he was acting in self-defense when he shot Deputy Horne and when he shot in the direction of Mark Cox.

Dr. Patricio Lara also testified on behalf of McKoy in the penalty phase of the trial. He has practiced psychiatry at Dix's Forensic Unit since 1968. (Tp. 1110) Dr. Lara's examination of McKoy occurred when McKoy was sent to Dix Hospital on the State's motion for a competency examination. Dr. Lara found that McKoy suffered from, "an adjustment disorder with mixed disturbance of emotions and conduct. We also confirmed an underlying personality disorder with mixed paranoid narcissistic features. . . ." (Tpp. 1112-13)

The State presented no psychiatric testimony. The testimony of Dr. Rollins and Dr. Lara provided ample evidence from which members of the jury could have been persuaded of the existence of the "unfound" mitigating circumstances. Dr. Rollins specifically noted that, in his opinion, McKoy was under the influence of a mental or emotional disturbance at the time Deputy Horne was killed. (Tp. 1133) Nevertheless, the jury failed to find the statutory mitigating circumstance that the murder was committed while Dock McKoy was under the influence of mental or emotional disturbance.

Additionally, there was uncontradicted evidence that Dock McKoy was sixty-five years old and suffered from high blood pressure, blindness in one eye, heart problems, a neurogenic bladder, and a hernia. (Tp. 882, 1113) According to Dr. Rollins, McKoy's physical problems and very limited education aggravated his mental and emotional problems. (Tp. 882) Dr. Rollins testified, "I thought the blindness in one eye, the history of high blood pressure, were both conditions that would predispose Mr. McCoy (sic) both to paranoid kinds of problems and to organic delusional syndrome kind of problems." (Tp. 886) Yet, the jury failed to find both the statutory mitigating circumstance of the defendant's age at the time of the offense, and the non-statutory mitigating circumstance that "Dock McKoy's mental and emotional disturbance is aggravated by his poor physical health." (J.A. 25)

There was evidence from Dr. Rollins to support the non-statutory mitigating circumstance that "Dock McKoy's ability to remember the events of December 22, 1984, is actually impaired." (Tp. 900) McKoy's own bizarre testimony as to the events of that day took on added significance in the light of Dr. Rollins's finding that McKoy was not malingering. (Tp. 885) Further, a reasonable juror could have found the existence of the non-statutory mitigating circumstance that "[f]or several decades Dock McKoy has exhibited signs of mental or emotional defect that went untreated." (J.A. 25) Both Dr. Lara and Dr. Rollins believed that McKoy's mental and emotional disorders were longstanding. Dr. Rollins said that McKoy had suffered from these disorders since his twenties. (Tp. 883) Dr. Lara indicated that, in his opinion, McKoy's personality disorder had existed for "a substantial period of time" (Tp. 1115), perhaps even from childhood. (Tp. 1114)

Because the jury failed to achieve unanimity as to these circumstances, it was prohibited from considering any of

the substantial evidence relating to the circumstances in deciding whether Dock McKoy should live or die. It took only the vote of a single juror against finding the presence of these mitigating circumstances—or, in the case of the non-statutory mitigating circumstances, a single juror's vote that the circumstance, though factually proved by a preponderance of the evidence, should not be deemed mitigating—to block the entire jury from considering the circumstances when the jury balanced the aggravating circumstances "found" against the mitigating circumstances "found." Likewise, when the jury turned to deciding whether the aggravating circumstances "found," considered in light of the mitigating circumstances "found," were sufficiently substantial to call for death, the jurors were again forbidden to consider any of the mitigation that was not unanimously found. Thus, precisely as in *Mills*,

> "[a]ny mitigating circumstance not so marked ["yes"], even if not unanimously rejected, could not be considered by any juror. A jury following the instructions set out in the verdict form could be "precluded from considering, *as a mitigating factor*, [an] aspect of a defendant's character or record [or] a circumstanc[e] of the offense that the defendant profferfed] as a basis for a sentence less than death," *Skipper* v. *South Carolina*, 476 U.S. [1, 4 (1986)], if even a single juror adhered to the view that such a factor should not be so considered.

Mills, 486 U.S. at ____, slip op. 12.

C. North Carolina's Capital Sentencing Procedure Is Constitutionally Indistinguishable From The Maryland Procedure Condemned in *Mills*.

The Supreme Court of North Carolina identified two differences between the North Carolina and Maryland capital sentencing procedures.

1. North Carolina's Fourth Question

First, the court noted that in Maryland the jury is required to impose the death penalty if the aggravating circumstances outweigh the mitigating circumstances. In North Carolina, before the jury is required to return a death verdict, it must make the additional finding that the aggravating circumstances found, considered in light of the mitigating circumstances found, are sufficiently substantial to call for the imposition of the death penalty. *State* v. *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33 (J.A. 68-69).

The existence of this additional requirement does not cure the unconstitutional effect of precluding consideration of mitigating circumstances unless they are unanimously found. *Both* the Third Issue *and* Fourth Issue submitted to McKoy's jury forbade the jurors to treat any evidence as mitigating unless they first unanimously agreed in finding the specific circumstance supported by that evidence. The court below does not suggest that North Carolina's system anywhere allows for consideration of blackballed mitigation. Rather, it implies that since North Carolina makes it more difficult for the jury to return a death sentence it is distinguishable from Maryland. *State* v. *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33 (J.A. 69-70) The point seems to be that because North Carolina may require a higher threshold of aggravation than does Maryland before a death sentence is compelled, it is constitutionally permissible to allow a single juror to preclude consideration of mitigating evidence.

Assuming that the Supreme Court of North Carolina is correct in characterizing the aggravating circumstance aspect of North Carolina's sentencing scheme as more

demanding than that of Maryland,[16] there is no support for the idea that this difference justifies in North Carolina what is *Lockett*[17] error in Maryland. The suggestion that *Mills* turned on some "mandatory" feature of the Maryland statute which is absent in North Carolina simply misapprehends *Mills* and the *Lockett* doctrine upon which *Mills* relies.

Mills holds that permitting one juror to prevent consideration of any relevant mitigation by the entire jury violates a capital defendant's right to have the sentencer consider *all* relevant mitigation. In other words, imposing a barrier to the consideration of *any* relevant mitigation violates *Mills*. The fact that in *Mills* the unconstitutional barrier led to the death verdict by one step was not the basis of the constitutional violation. Two unconstitutional steps are equally bad. As the *Mills* opinion plainly shows, the constitutional violation there, as here, consisted of a jury instruction that risked the preclusion of consideration of relevant mitigating evidence:

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[16] It is not at all clear that this assumption is correct. It appears that the ten statutory aggravating circumstances set out in the Maryland sentencing statute, Md. Ann. Code, Art. 27, § 413(d), are drawn significantly more narrowly than the eleven statutory aggravating circumstances in North Carolina. *Cf.* N.C. Gen. Stat. § 15A-2000(e) (1983). For example, unlike North Carolina, there is no "especially heinous, atrocious, or cruel" aggravating circumstance in Maryland. *See generally Maynard* v. *Cartwright*, 486 U.S. ____ (1988); *Godfrey* v. *Georgia*, 446 U.S. 420 (1980). Further, one of the aggravating factors relied upon by the North Carolina jury to make the petitioner's aggravating circumstances sufficiently substantial to call for the death penalty—that the defendant had previously been convicted of a felony involving the threat or use of violence—would not be available under the Maryland statute. Md. Ann. Code, Art. 27, § 413(d).

[17] *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett* v. *Ohio*, *supra*; *Hitchcock* v. *Dugger*, [481 U.S. 393 (1987)]; by the sentencing court, *Eddings* v. *Oklahoma*, [455 U.S. 104 (1982)]; or by an evidentiary ruling, *Skipper* v. *South Carolina*, [476 U.S. 1 (1986)]. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, if petitioner's interpretation of the sentencing process is correct, the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider *all* of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Eddings* v. *Oklahoma*, 455 U.S. at 117, n.* (O'Connor, J., concurring).

Mills, 486 U.S. at ____, slip op. at 7 (emphasis supplied).

Mills did not turn on the fact that the jury happened to find *no* mitigation but instead on the fact that the jury instructions permitted *any* mitigating evidence to be kept from consideration by a single juror blackball. Nor was the opinion limited to cases where the jury *must* impose the death penalty once the mitigation has been improperly excluded. Rather, the Court stated that "it would certainly be the height of arbitrariness to *allow or require* the imposition of the death penalty" where a risk exists that mitigation has been precluded by the vote of one lone juror. *Mills*, 486 U.S. at ____, slip op. at 6 (emphasis supplied).

Further, the cases relied upon by this Court in *Mills* do not support the idea that precluding the jury from considering relevant mitigating evidence violates the Eighth Amendment only if all possible mitigating evidence is precluded or if the sentencer must impose the death

penalty if it finds no mitigation. On the contrary, *Mills* and the cases upon which it relies stand for the constitutional rule that the death penalty may not be imposed where there is a barrier to the sentencer's consideration of *any part* of the case for mitigation. Improper exclusion of *all* mitigation is not necessary for reversible *Lockett* error. This Court applied *Lockett* to order new sentencing hearings in *Hitchcock*, *Skipper*, and *Eddings* although in every one of these cases, the sentencer considered some—but not all—relevant mitigation.

It is true that Dock McKoy's jury, unlike Ralph Mills's, theoretically could have avoided the imposition of the death penalty by finding the aggravating circumstances alone insufficiently substantial to call for death. Still, precluding the consideration of *any* mitigating evidence in the ultimate sentencing decision is no less a *Lockett* error merely because the jury could have returned a life sentence on the basis of something *other than* the precluded mitigation. The sentencers in *Hitchcock*, *Skipper*, and *Eddings* were also free to return life sentences on bases other than the mitigating evidence that was kept from their consideration. Nevertheless, in all three cases a *Lockett* violation was found. As this Court reiterated in *Mills*, "'[b]ecause the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.'" *Mills*, 486 U.S. at ___, slip op. at 7 (*quoting Eddings* v. *Oklahoma*, 455 U.S. at 117, n.* (O'Connor, J., concurring)).

2. Legal Relevance

In *Mills*, this Court pointed out in a footnote that "[n]o one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally 'irrelevant' by one holdout vote." *Mills*, 486 U.S. at ___, n.7, slip op. at 6, n.7. The Supreme Court of North Carolina seized upon that footnote to find a second difference between the capital sentencing procedure in North Carolina and that of Maryland. It held that in North Carolina "evidence in effect becomes *legally irrelevant* to prove mitigation if the defendant fails to prove to the satisfaction of all the jurors that such evidence supports the finding of a mitigating factor." *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33 (J.A. 69-70) (emphasis supplied). This novel interpretation of "legal relevancy" fails to pass constitutional muster under the *Lockett* doctrine. *Skipper*, 476 U.S. at 7.

Until *McKoy* was decided, the law of relevancy in North Carolina had always been that "[t]he competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury." 1 H. Brandis, NORTH CAROLINA EVIDENCE, §8, at 32, n.7 (3rd ed. 1988), *citing Queen City Coach Co.* v. *Lee*, 218 N.C. 320, 11 S.E.2d 341 (1940). *See, generally*, N.C. R. EVID. 103(c), 402. In his dissent in *McKoy*, the Chief Justice of the Supreme Court of North Carolina unmasks the problems with the majority's new view of relevancy.

> "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *New Jersey* v. *T.L.O.*, 469 U.S. 325, 345, 105 S.Ct. 733, 744-45, 83 L.Ed.2d 720, 737 (1985), quoting Fed.R.Evid. 401. As noted by Thayer, "The law furnishes no test of relevancy." E. Thayer, *A Preliminary Treatise on Evidence at the*

> *Common Law* 265 (1898) The concept of logical relevancy employed in Rule 401 must be kept separate from issues of sufficiency of evidence for any purpose such as to satisfy a burden of production. M. Graham, *Handbook of Federal Evidence* § 401.1 (2d ed. 1986). This concept of relevancy is the same in the context of mitigating evidence in a capital sentencing proceeding as it is in other contexts. Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered. *Id.* at § 401.1 n.12.

State v. *McKoy*, 323 N.C. at 55-56, 372 S.E.2d at 45 (J.A. 88-89) (Exum, C.J., dissenting).

Notably, the "legal relevancy" rationale appears for the first time in *McKoy*, although the state supreme court first approved North Carolina's unanimity requirement five years earlier. In *State* v. *Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), the court addressed a challenge to the requirement that jurors unanimously agree upon mitigating circumstances before they may consider mitigating evidence relating to that circumstance. The jury instructions in *Kirkley* did not inform the jury whether or not it had to be unanimous on mitigating circumstances. After retiring to deliberate, Kirkley's jury requested additional instruction on whether it was required to be unanimous as to the existence of a mitigating circumstance. The trial judge told the jurors that they must be unanimous to find a mitigating circumstance. *Kirkley*, 308 N.C. at 230, 302 S.E.2d at 163-64 (Exum, J., dissenting).

On appeal to the Supreme Court of North Carolina, the defendant challenged this unanimity instruction, arguing that it violated the *Lockett* doctrine. The defendant argued that if unanimity was indeed required, the jury should have been instructed that it had to be unanimous to reject, as well as to find, the existence of a mitigating circumstance. *Cf. Mills*, 486 U.S. at ___, slip op. at 3 (Rehnquist, C.J., dissenting). At that time, the State agreed that a unanimity requirement was "constitutionally suspect" under the *Lockett* doctrine. *Kirkley*, 308 N.C. at 229, 302 S.E.2d at 163. The State's brief acknowledged that, in light of *Lockett*, "[i]t would seem manifestly improper, then, not to permit members of the jury to consider a factor in mitigation simply because all members of the jury were not satisfied with the defendant's showing concerning a particular mitigating circumstance." *Id.* (quoting from the State's Brief.)

Despite arguments from both the defendant and the State that the unanimity requirement could allow a single juror to preclude the remaining jurors from considering mitigating evidence and thus run afoul of *Lockett*, the Supreme Court of North Carolina held that North Carolina law requires just such a procedure. The court declared that since the jury was required to be unanimous to find the existence of an aggravating circumstance, "consistency and fairness" dictated that unanimity was required for mitigating circumstances as well. The *Kirkley* court made no mention of the concept of legal relevancy as a justification for the unanimity requirement. It was not until after *Mills* came down that the phrase "legally irrelevant" was first used by the Supreme Court of North Carolina to describe mitigating evidence blackballed by one or more jurors. This usage was urged upon the court by the Attorney General of North Carolina

in his supplemental brief filed after the decision in *Mills*. *Supplemental Brief of Appellee at* 11, State v. *McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988) (No. 585A85).

In *Mills*, this court addressed a Maryland Court of Appeals decision that engaged in the very kind of creative jurisprudence that the Supreme Court of North Carolina performed in *McKoy*. Indeed, the *Mills* court noted that the dissenting opinion in the Maryland Court of Appeals complained that the construction of the Maryland statute given by the majority "'appears out of the blue after nearly ten years of extensive litigation involving this statute.'" *Mills*, 486 U.S. at ____, slip op. at 12-13 (citations omitted). *See also Skipper*, 476 U.S. at 6 (1986) (expressing skepticism about the integrity of South Carolina's argument that the precluded mitigating evidence was irrelevant under state law). Similarly, "legal relevance" makes its debut as a legal justification for the North Carolina blackball after years of litigation on the subject.

But even taken at face value, North Carolina's state-law holding that evidence rejected by as few as one juror is "legally irrelevant" must bow to the defendant's Eight Amendment right to have the sentencer consider evidence pertaining to the defendant's character, background, and the circumstances of the offense. *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). In *Skipper*, the State of South Carolina defended its exclusion of mitigating evidence relating to the defendant's future adaptability to prison life by labelling such evidence "irrelevant" to the character, prior record, or circumstances of the offense. After noting that the distinction between evidence of past behavior in prison and future adaptability to prison life was an "elusive" one, this Court concluded:

> Assuming, however, that the rule would in any case have the effect of precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment, the rule would not pass muster under Eddings.

Skipper, 476 U.S. at 7. That is equally the case here.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays the court to vacate the judgment of the Supreme Court of North Carolina insofar as it sustains the imposition of the death penalty.

Respectfully submitted,

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APPENDIX

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NORTH CAROLINA GENERAL STATUTES

CAPITAL PUNISHMENT.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty.—

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any

matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury.—Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether, the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the

jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death.—When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence.—

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of

death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances.—Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances.—Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)